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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR N. BERNKLAU

Petitioner,

v.

THE UNITED STATES OF AMERICA,
THE DEPARTMENT OF VETERANS AFFAIRS
AND JESSE BROWN, SECRETARY OF
VETERANS AFFAIRS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR VETERANS DUE PROCESS, INC., AMICUS CURIAE, IN SUPPORT OF THE PETITIONER, SUBMITTED PRIOR TO CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI, WITH WRITTEN CONSENT OF ALL PARTIES

Philip E. Cushman
President,
Veterans Due Process, Inc.
P.O. Box 68237
Portland, Oregon 97268
(503)659-9912

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INTEREST OF AMICUS

Counsel for both parties have consented to the filing of this amicus brief by Veterans Due Process (VDP) in support of the petitioner, Arthur N.Bernklau 92-1381. VDP is a 1983 grass roots organization, in the best of American traditions. The American Bar Association, the National Law Journal, Stars & Stripes, inter alia, have commended us for our work in behalf of veterans seeking judicial review.

VDP has testified on numerous occasions before the House and Senate Veterans Affairs Committees in the pursuit of judicial review. Moreover, we have supported legal actions in Marozsan v. United States, (at Appellate Level, In Banc), 852 F.2d 1469 (7th Cir. 1988) and Cooper v. United States, U.S. Supreme Court docket # 90-180, as an Amicus in support thereof, requesting the invalidation of 38 U.S.C. § 211(a), (the

no judicial review clause), as being unconstitutional, inter alia.

The stated goal of VDP is to secure "Due Process of Law" through judicial review and the unrestrained right to retain attorneys, for all disabled American veterans pursuant to their VA claims for compensation, medical care, etc.

VDP is particularly interested because substantial evidence was and continues to be developed, demonstrating that the VA uses "unpublished" practices and procedures to deny veterans fair and impartial hearings; and that such hearings result in "implausible" decisions which are later judicially "unreviewable".

Practices and procedures similar to those disclosed in numerous Social Security cases evidencing that adjudicators were rendering decisions contrary to the facts and their own professional opinions in deference to budgetary considerations. Such practices

and procedures' were roundly condemned by almost every Federal Court.[1]

It is vital to the interests of our nation, that such injustices, as disclosed in Tracy v. Gleason, 379 F.2d 469 (1967), Marozsan, Bernklau, Cooper - and other well documented cases, be remedied, else our ability to raise an army will be greatly impaired to the detriment of our national defense.

George Washington reminded the nation of its responsibility to veterans and its own well being, warning:

> "How the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices."

Failure to heed that warning can have catastrophic consequences for the

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1. Bowen v. City of New York, 476 U.S. 467 (1986); City of New York v. Heckler, 578 F.Supp. 1109 (1984); Schweiker v. Chilicky, 487 U.S. 412 (1987); McLean v. Heckler, 586 F.Supp. 1364 (1984); Mental Health Association of Minnesota v. Heckler, 720 F.2d 965 (1983); inter alia.

willingness of future generations to defend this nation - unless, of course, the enemy is at the front door - and then, of course, it may be too late.

SUMMARY ARGUMENT

In the most perfect of worlds, justice would be uniformly granted in a wise and compassionate manner. Unfortunately, none of us is privileged to live in such a world. All of us unfortunates, require the protection of laws, not men, to insure the blessings of freedom and liberty.

The original thirteen states knew this when they refused to adopt the Constitution unless it contained a Bill of Rights. That wisdom culminated with the adoption of rights which are now the cornerstone - of every single group of Americans, save one - the disabled American veteran. Why them?

Alone, among Americans - veterans, are powerless to redress bureaucratic wrongs

done them because of unwise, unjust and unconstitutional laws which deny meaningful access to court review of "implausible" decisions rendered solely for budgetary reasons.

Particularly, we owe a debt of gratitude to our veterans, many of whom served this nation, not always knowing precisely what the objective was, yet ready to die for their country and its principles.

Those thoughts were best expressed by the words of Dr. Randolph McKim, which were later engraved upon a memorial to the Confederate dead at the Arlington National Cemetery:

> "Not for fame or reward, not for place or rank, not lured by ambition or goaded by necessity, but in simple obedience to duty as they understood it, these men suffered all, sacrificed all, dared all and died."

How have we chosen to repay our disabled veterans? Not with the blessings of liberty and the constitution, but with indignity, humiliation and degradation

while their rights are trampled upon by an unbridled "dictatorship of the bureaucrat" armed, with a hidden agenda.

Where is it written that bureaucrats are imbued with such infinite wisdom and integrity that they must be obeyed without question? Where is it written that bureaucratic wisdom is "unreviewable" by the Courts? Where is it written that the concept of checks and balances are no longer valid? And where is it written that the protections afforded under the Bill of Rights applies to everyone but disabled veterans?

The undeniable answer is nowhere, except in the minds of Congress, but that doesn't make it constitutional, nor empower Congress to repeal either the law of common sense or the right to be meaningfully heard, due process, and equal protection as afforded to all Americans under the First and Fifth Amendments.

Common sense teaches that all power must never be placed in the hands of one individual, much less a bureaucracy, without reaping the consequences of such folly. History fully records what those consequences were, and what we will surely reap, if those same mistakes are repeated.

Ross Perot has been looking for hostages all over the known world and can't find any. Yet they are here by the tens of thousands, right under his nose, held hostage by the V.A. and improvident laws. Is it any wonder that the Courts and the American people know nothing about the largest scandal in our history? A conspiracy of silence either through ignorance or design has kept the "awful truth" from the American people.

An old adage has it: "when a scandal is large enough, there is no scandal". Similarly, who can forget the circumstances, under which, the Emperor had no clothes and none dared tell him.

Those same circumstances plague veterans today, a scandal so large that no one, save VDP, dare tell the "awful truth" to the American people or the courts.

Just as the jurisprudehtial concept of "separate but equal" could not withstand constitutional scrutiny once the facts were known, and reason prevailed (see: Brown v. Board of Education, 347 U.S. 483 (1954)), neither can an apartheid system of injustice, featuring "non-adversarial" decisions without meaningful judicial review survive constitutional examination.

Mr. Bernklau's writ details with some particularity his traumatic experiences while endeavoring to obtain compensation for injuries sustained while a member of our armed forces during the Korean war. His fight has continued for almost 40 years and remains to be won for all.

Nothing unusual about Bernklau's circumstances, VDP is aware of countless cases which were decided solely on the

basis of budgetary considerations irrespective of the merits. Although the facts overwhelmingly favored the veteran, the decisions to deny were "unreviewable". Other veterans organizations are similarly aware of numerous unfair decisions - but have chosen to remain silent, fearful of losing free rent and services given at the sole discretion of the VA Secretary under 38 U.S.C. § 3402(a)(2) [Now:§ 5902(a)(2)].

ARGUMENT

38 U.S.C. § 211(a) [now: § 511(a)] remains at the heart of any constitutional issue associated with the administration of veterans claims, despite the enactment of P.L. 100-687, The Judicial Review Act of 1988, and the alleged changes contained therein.

Said law continues de facto to preclude veterans from obtaining judicial review of claims decisions no matter how arbitrary or capricious, and continues de facto to

grant the VA unrestrained license to employ procedures devised specifically to deny veterans fair and impartial claims consideration.

Let us then examine what the controlling decisions held and then review how such decisions were applied (or misapplied) in the lower courts:

1. JOHNSON v ROBISON, 415 U.S.361(1974)

The seminal decision remains this Court's ruling in Johnson v. Robison, which held:

> "section 211(a) does not extend to actions challenging the constitutionality of veterans benefits legislation but is aimed at prohibiting review only of those decisions of law or fact arising in the administration of the statute..."
> (at 361)

Sec. 211(a), in pertinent part, provides:

> "....the decisions of the Administrator on any question of law or fact. . . shall be final and conclusive and that no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in mandamus or otherwise."
> (emphasis added)

Unlike many other laws enacted by Congress, § 211(a) is very explicit, and if, it were interpreted literally, the VA would have license to decide cases solely on the basis of race, creed, or color; in favor of veterans born only on Tuesdays, or any other basis it might choose - and no one, would have standing to challenge its decisions or the constitutionality thereof, irrespective of the circumstances.[2] Hence, major "creative" surgery was required since no law, no matter how explicit, could be interpreted to deny the Court's historic role in ruling on the constitutionality of legislation. Accordingly, the Johnson Court, in deference to Congress, decided to fashion a remedy to maintain the laws

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2. Judge Richard Posner of the 7th Circuit would describe §211(a), as being comparable to "Keep Off The Grass" signs - which if strictly observed, would lead to disastrous consequences.

constitutionality. It needed to be very "inventive", and it was.

First, it dismissed the government's contention that § 211(a) bars federal courts from deciding the constitutionality of veterans' benefits legislation, reasoning that:

> "such a construction would, of course, raise serious questions concerning the constitutionality of § 211(a)."(at 367)

Later, adding further emphasis to its view, this Court concluded:

> "Plainly no explicit provision of § 211(a) bars consideration of appellee's constitutional claims." (at 367)

The Johnson court reasoned that the appellee's constitutional challenge was to a decision of Congress, and not to the VA Administrator, thereby fitting neatly within the parameters of what Congress had written. That simple construction rendered the law constitutional while appearing to retain the sanctity of the "no review" clause. Admittedly, a brilliant stroke of judicial legerdemain.

At this point, the Court had devised a tenuous rationale for § 211(a)'s constitutionality, but needed more, much more, and apparently found it in a VA document submitted to Congress in 1952, (22 Years earlier), which the Court somehow obtained during the course of its deliberations.

Facing an almost insurmountable task, the Johnson court strove mightily to justify the indefensible, explaining:

> "While the legislative history accompanying these precursor no review clauses is almost nonexistent, the Administrator, in a letter written in 1952 in connection with a revision of the clause under consideration by the subcommittee of the House Committee on Veterans Affairs, comprehensively explained the policies necessitating the no review clause and identified two primary purposes:
>
> > "1. to insure that veterans benefit claims will not burden the courts and the Veterans Administration with expensive and time consuming litigation, and "
> >
> > "2. to insure that the technical and complex determinations and applications of Veterans Administration policy connected

> with veterans' benefits will be adequately and uniformly made."
> (at pages 369, 370)

Regrettably, there is absolutely no evidence to suggest that the Johnson Court inquired into the relevancy in 1974, of the VA's 1952 statement of justification re the "judicial no review" clause, or whether it was ever relevant at any time.

Accordingly, let us now examine both policy justifications for the "no review" clause and see how faithful the VA was to the policies it alleged necessitated the "no review" clause.

Re: COURT OVERCROWDING

A Wisconsin Law Review article, written by Law Professor Marc Galanter, Volume 1988, reported on page 929 thereof:

> "In 1980, the VA was empowered to sue to collect debts without referring the matter to the Department of Justice. An Office of Debt Collection was established in 1982 to centralize control over debt collection activities. Filings increased astronomically, culminating in 1985 when 58,159 cases were filed - fully 21.3% of all civil cases in the federal district courts."

Although the VA pretends that it is solicitous of the Court's calendar overcrowding problems, it has hauled approximately 200,000 veterans into federal court in an endeavor to correct its own "unreviewable" mistakes.

One of the VA's "unreviewable" mistakes, resulted in the suicide of a highly decorated veteran of the Vietnam war, Sgt. Ronald Beck. Beck with two tours of duty, took his own life, leaving a wife and two children. His last words were: "I could fight the Viet Cong, but not the VA."

Sgt. Beck's fight with the VA had been going on for years pursuant to his 100% disability claim. But the straw which broke the camel's back occurred when the VA erroneously cut off all of his disability payments pursuant to an alleged overpayment claiming he owed $ 1798. Months and months went by and try as he might, nothing could cause the VA to correct its error. During all this time

he was represented by the Disabled American Veterans (DAV),

Finally, dead broke, totally disconsolate, and not wishing to become a burden to his family, he simply took his own life in the tool shed behind his home.

His death in 1984 created a furor in the Press and Congress which the VA couldn't ignore. Ten days after his death, the VA acknowledged its mistake and admitted that instead of him owing them $1798, it owed him approximately $ 10,000; and that instead of a 40% disability, he was entitled to a rating of 100%, something he had claimed for many years to no avail.[3]

It seems that once public attention is focused upon the VA's claim adjudication system, strange and miraculous things happen when the VA seeks to practice

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3. Mrs. Ronald Beck, a VDP member, remains in the fight to obtain justice in behalf of the disabled veterans.

damage control to prevent the unraveling of its "unreviewable mistake" process.

For example, the Beck case which had gone on for years without resolution (re 100% disability) suddenly, ten days after his death, the merits thereof became crystal clear. What had occurred to cause this amazing reversal in VA thinking? Light, the great disinfectant, purified the VA's decision making process, shedding new insight into the merits of Sgt. Beck's claim -- merits which were obvious from his claim's inception! Like Sgt. Beck said: "I could fight the Viet Cong but not the VA" (His last words, recorded on tape in the back of the tool shed).

Why couldn't Sgt. Beck, one of our most decorated combat soldiers, fight the VA? Simply because the Congress had stripped him of his constitutional right to litigate the merits of his claim, before a fair and impartial forum. In effect, rendering him powerless to correct a gross

injustice which, but for his well publicized death, would continue to remain unresolved.

Sgt. Beck was just another one of those nameless veterans caught up in Professor Galanter's statistics. Make no mistake, there were thousands more. The VA won't talk, but its employees will, if veterans are permitted to litigate the constitutionality of its practices and procedures in the District Courts.

Obviously, the VA couldn't care less about court calendar overcrowding, hauling veterans into the federal court in record numbers, occupying in 1985, 21.3% of all civil cases. This is an old VA ploy, using someone else's concerns to make its own case for maintaining the veil of secrecy over its Claims Operation process.

For example, in order to justify to Congress and the courts, the VA's long standing opposition to veterans having attorneys, it cried crocodile tears over

veterans having to share their awards with attorneys. Veterans simply reasoned they were losing, losing, losing, no matter what kind of a case they had; consequently believing that they were much better off receiving 70% of something - rather than 100% of nothing.

This Court should take exception to bureaucrats expressing their fears in the guise of other people's concerns. In one instance, concern for court overcrowding; in the other, for the veterans' pocketbook. Meanwhile their sole motive is to keep the "awful truth" from the American people.

Why should anyone accept the concept of "no review", when the VA is so prone to mistakes (if that's what they are), primarily because their decisions are "unreviewable"? And why should the VA be allowed to haul veterans into Court upon the slightest provocation, while veterans

can neither return the favor nor plead a defense, such as Sgt. Beck? Why?

Conventional wisdom dictates: "What's sauce for the goose, must likewise be sauce for the gander", or has expediency become our sole "raison d'être", causing us to abandon the Bill of Rights to self serving bureaucrats, etc.

Thomas Jefferson in a letter to James Madison wrote:

> "Any people which would willingly sacrifice a little bit of freedom for a little more safety, will lose both and deserve neither."

Then wouldn't it necessarily follow that any people willing to sacrifice judicial review for the sake of expediency be similarly impoverished and disadvantaged? Moreover, what does it profit society to gain expediency while it sacrifices the very principles upon which it became a great nation - and which, if continued, will eventually lead to its destruction one principle at a time.

Re: **Expensive and Time Consuming Litigation**

The V.A.'s professed concern against involving itself in expensive and time consuming litigation, likewise was not genuine - but merely, another of its contrived justifications for avoiding public scrutiny. If genuine, that concern could have been substantially mitigated by rendering plausible and fair decisions.

Additionally, very few attorneys would wish to waste their time bringing meritless cases while Rule 11 sanctions would apply to those who did.

Again, the VA's concern has never been for the Courts, but rather for its own public image - and the bad press it would receive in cases such as Tracey v. Gleason[4].

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4. See: Tracey v. Gleason in Bernklau Petition for Certiorari, at pages 16, 17.

How many more cases like Tracy could the VA stand before the public would demand change and bring an end to its "non adversarial" system of injustice!!?

Further, if the VA were truly concerned about expenses, wouldn't it do something to get some worthwhile results out of its $ 20 billion hospital program, which according to GAO reports lacks leadership and accountability in a 220,000 person operation -- a system which places the care and treatment of veterans secondary to its own parochial interests. This Court should read some GAO reports and newspaper accounts of how veterans are treated and find out how bad it is.

If the VA were truly concerned about costs, it could save billions in better health care at reduced cost. Raising the expense issue, is simply another disingenuous ploy to justify its

unwillingness to subject itself to public scrutiny.[5]

Voicing concern for the taxpayer's pocket book is but another smoke screen covering its genuine fear of the public's learning the "awful truth", which is at the core of its primary interests. No one should be deceived by the VA's self-serving declarations in behalf of the taxpayer's pocketbook and the court's welfare.

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5. Diane Sawyer reported on ABC's Prime Time Live program, (9/27/90), filming a paralyzed veteran going unfed for three days; VA doctors routinely failing to change their gloves, leading to much staph infection; nurses required to falsify medical records, inter alia.

Likewise, the Washington Post reported (5/14/91) veterans missing from their hospital beds, in some cases for years, later found dead on the hospital grounds. Inexplicably, the Hospital staff continued for a time to renew medical prescriptions, privilege status and diet for the missing patients, in an endeavor to hide their absence.

Re: Technical and Complex Determinations

(are uniformly made)

The VA's assertion that only it could make technical and complex medical decisions, whereas the Courts could not, is belied by the Congressional evidence detailed in Bernklau's Writ of Certiorari. That evidence clearly demonstrates that the VA isn't interested in making fact based and plausible decisions whether they're technical, complex or simple, obvious and straight forward. The VA's primary concern, as always, is to obey the Office of Management and Budget's (OMB) imperative of meeting budgetary requirements irrespective of any claim's merits. Failure to do so, could result in lost promotions, bonuses, perks, and other important considerations vital to a bureaucrats' welfare.

At this juncture it is important to briefly mention what some of that evidence was:

a) Ron Abrams, a high ranking VA employee, issued a White Paper (expose) to top VA management, detailing some of its due process problems, which were described as follows: 1) the VA has an "...unfair, adversarial claims adjudication system". 2) The VA "pits the financial interests of adjudication officers against the fair and reasonable treatment of our claimants". 3) veterans claims are prematurely denied without notice. 4) claims were not properly developed. 5) due process routinely ignored. 6) constitutional rights are systematically violated. (see: Bern.App: C 32-39).

The Abrams VA "White Paper", depicts what's inside the "belly of the beast", and tells this Court much of what it needs to know about the VA and its "plague infested" non adversarial system of

injustice - stripping bare the facade of deceit and pretense for all to see.

b) Dr. Alcide Pellerin, a VA employee for approximately ten years, testified before the Senate that he was coerced on numerous occasions by the BVA Chairman, into rendering decisions contrary to the facts and his professional opinion.[6]

c) BVA attorney Norman Johnson testified that racial considerations were often taken into account when making decisions. He was likewise required to write opinions contrary to the evidence and his professional opinion.[7]

d) An anonymous letter from a top VA employee, advising that medical decisions were being made at the rate of one per minute at some VA regional offices.[8]

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6. Bernklau Writ: Appendix: C 47-55.
7. Bernklau Writ: Appendix: C 76-84.
8. A later letter from the same anonymous VA employee, resulted in a San Francisco District Court, levying a $115,000 fine against the V.A. for destroying documents evidencing due process violations; and

e) Donald Schwab, a top VFW employee reported that large numbers of service officer's could not help wondering why so many obviously meritorious cases were being denied. (Bern. App: C 85-93)

f) Phil Wilkerson of the American Legion, likewise could not understand why so many meritorious cases were denied at Regional level only to be affirmed at BVA level. (Bernklau Appendix: C 115)

g) Grievance hearings demonstrated some BVA adjudicators dismay over having to decide 40-80 cases per week. Likewise, expressing substantial due process concerns over some members having to resort to courtesy decisions[9] in order to

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caused the appointment of a Special Master to insure that future documents requested were faithfully executed. (Bernklau App: C 21; C: 22-26)

9 "Courtesy decisions" is the practice of signing off on cases (always to deny) without having read the file or viewed the evidence, in order to meet production quotas of 40-80 cases per week. BVA adjudicators benefiting from courtesy

meet their case load quota. (Bern. App: C: 104-110)

h) Kenneth Blaylock, AFGE Union President (116,000 V.A. members) registered serious concern over impermissible actions leaving "wide discretion for inconsistent and uncontrolled decision making by the regional offices." Moreover, that there was "no institutional check" on the VA's practices. (Bern. App: C-73)

i) Inter alia, ad nauseum, ad infinitum.

With practices such as those described above, assuming the VA had the expertise to decide technical and complex medical claims better than the Courts, what difference would it make? Its cases are decided upon budgetary, not fact driven considerations, in which the merits

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decisions would later reciprocate by likewise issuing courtesy decisions.

thereof, play little or no role in its "unreviewable decisions".

Is it any wonder why VA bureaucrats will fight to the death to keep lawyers, judicial review, and anything else calculated to shed light upon its wretched claim system, to keep the "awful truth" from the American people. Nor is it any wonder why disabled veterans will keep fighting with every fibre of their being to insure that fairness and justice are fully restored. Veterans expect no more and will accept no less.

Re: Uniformity of Decisions

Decision uniformity is but another of the VA's justifications adopted by Johnson to support the necessity for the "no review" clause. Like the preceding erroneous justifications cited herein, it too is fatally flawed, totally lacking in candor, honesty and sincerity. Congress

and this court were entitled to the truth, but never received it from the V.A.

BVA Chairman Eaton's own testimony before Congress acknowledged that he couldn't get uniformity in the same building, on the same floor, or in the same office room, much less throughout the country. (Bernklau Appendix: C 113)

Inexplicably, since the V.A. never codified its cases, how could it allege to the Johnson Court that it had achieved even a small measure of uniformity? How indeed, could that laudatory goal have been accomplished in the absence of case codification?

The VA's compass was, and remains, clearly pointed in the direction of reduced ratings or outright denial of meritorious claims. Only in that sense could the term "uniformity" be applied to the V.A. - none other.

Re: Raising An Army/ National Security

A recurring theme, throughout the Johnson court's deliberations, as expressed, in its opinion, was the absolute imperative to raise an Army and provide for the national defense. VDP does not quarrel with that necessary requirement, but seriously questions how this nation is going to raise any army or engage in any draft of its youngsters, once its people learn the "awful truth" about how disabled veterans are treated.

Under the circumstances, if the importance of raising an Army is so vital to the nation's defense, then how can this court, or any court for that matter, refuse disabled veterans judicial review of evidence needed to establish constitutional abuse?

The fact is, that the Johnson holding, declaring § 211(a) constitutional was predicated on monstrous fabrications, upon

which this Court relied, resulting in a travesty of justice, whose rationale was based upon information gratuitously given by the VA, having absolutely no validity.

Johnson relied upon Congress; Congress upon the V.A.; and the V.A. relied upon outright lies, leaving veterans holding the bag, while justice took a holiday.

Johnson's rationale (decision) was fundamentally flawed and must be overturned and § 211(a) expunged from our laws while leaving the shameful record intact to guide future generations.

No amount of tinkering can fix it now. Try as you will, § 211(a) remains what it always was, unconstitutional on its face, and as applied. Common sense mandates that so much unbridled power must never again be placed in the hands of any official or agency, no matter how good their intentions may be. Such laws have no place in a democratic society, and must be resolutely struck down, lest the entire

body politic become infected with its deadly virus and the nation perish.

Re: Other Important Cases

While Johnson held that statutes could be constitutionally attacked under the "no review clause", later courts (since 1974) found in what they perceived as logical extensions of Johnson, that the VA's regulations could be constitutionally challenged and, further, that its practices and procedures could likewise be subjected to constitutional examination.

Wayne State v. Cleland, 590 F.2d, 627 (6th Cir. 1978) expanded Johnson and held that § 211(a) does not preclude challenges to the VA Administrator's authority to promulgate regulations.

Merged Area X v. Cleland, 604 F.2d, 1075, 1078 (8th Cir. 1979) followed Wayne State, ruling that § 211(a) "was not designed to preclude judicial review of a challenge to the Administrator's authority

to promulgate regulations..." Similarly, the case of Evergreen State College v. Cleland, 621 F.2d, 1002 (9th Cir. 1980), cited and followed Wayne State on the regulations issue.

In Dumas v. Cleland, 486 F. Supp. 149 (D. Vt. 1980), judicial review was extended to procedures when it held that § 211(a) does not bar judicial review of a claim that Veterans Administration's procedures violate due process.

The rationale of the Johnson v. Robison holding was further defined in Plato v. Roudebush 397 F. Supp. 1295 (D. Md. 1975), to permit review of VA hearing procedures. Plato held that the VA's failure to provide a pension recipient a "pretermination" hearing was a denial of plaintiff's due process rights and that § 211(a) does not preclude court review of the constitutionality of VA procedures. Plato has been relied on as a basis for jurisdiction in a number of subsequent

suits questioning the constitutionality of V.A. procedures.

Even before the Supreme Court decision in Johnson, Federal District Courts, relying on Goldberg v. Kelly, 397 U.S. 254 (1970), had assumed jurisdiction in suits challenging the constitutionality of Veterans Administration procedures. The Goldberg case did not involve veterans' benefits but its principles were generally applied to veterans' litigation.

The issue in Goldberg was whether the due process clause required the holding of an evidentiary hearing before terminating the continued receipt of welfare payments. The Supreme Court held that due process required a hearing prior to the termination of benefits.

The earliest of several unreported class action suits challenging the constitutionality of Veterans Administration procedures may be found in Wallace v. The Administrator of Veterans

Affairs, No. 14499 (D. Conn., filed December 23, 1974). In Wallace, the Court assumed jurisdiction on the grounds that an allegation of constitutional deprivation was a sufficient basis for jurisdiction.

The Wallace Court denied the Government's motion to dismiss for lack of jurisdiction pursuant to the prohibition contained in section § 211(a). The Court found that the plaintiff was not seeking review of the Administrator's decision but was, instead, seeking enforcement of his due process rights to notice and a hearing prior to any decision to modify or otherwise terminate his benefits. The Court concluded that the principles established in Goldberg v. Kelly were dispositive of questions presented in Wallace.

Chief Justice Rehnquist writing for the majority in Walters v. NARS, 473 U.S. 305, 311 at n. 3, (1985) reasoned:

> "Despite the general preclusion of judicial review with respect to benefit claims, this Court held in Johnson v. Robison, 415 U.S. 361 (1974), that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims system."

That opinion expressed by the Supreme Court in 1985 would appear to validate actions taken by those courts accepting jurisdiction in cases involving challenges to the constitutionality of legislation, regulations and procedures.

Moreover, said holding in NARS would appear to extend Johnson still further and to now encompass the entire VA claims system.

In 1988, along came Marozsan v. United States, (In Banc), 852 F.2d, 1469 (7th Cir. 1988) in which for the first time a court endeavored to extensively define Johnson by discussing most, if not all, of the constitutional questions presented by § 211(a). If Johnson was the seminal

case, then Marozsan is noteworthy for being its clearest expression.

The breadth of the Marozsan decision which held that the VA's practices and procedures are subject to judicial review, is best understood by the vigorous language employed by the 7th Circuit when rendering its opinion, which follow from the brief excerpts, as recorded below:

1) "Marozsan's allegation that the VA Administrator utilizes an arbitrary "quota system" requires constitutional analysis particularly within the competence of an independent judiciary." (at 1474)

2) "Courts.....must be equally reluctant to license free wheeling agencies to mete out their own brand of justice." (at 1477)

3) "It is axiomatic that Congress may not act unconstitutionally, nor may it delegate authority to executive agencies to do so." (at 1477, 1478)

4) "If the Court were to accept the government's position that 211(a) bars a review of Marozsan's claim ..... [that] would subvert the judiciary's function of providing a check against arbitrariness ... by Congress, the Executive, and their Administrative agents." (at 1478)

5) "To deny jurisdiction to claimants like Marozsan, would be to find that veterans simply have no forum in which to

pursue a claim that the VA violated the Constitution." (at 1478)

6) "A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action of the [VA] Administrator. (at 1478)

{note: Referring to the VA's assertion that the courts lacked authority under 211(a) to review the constitutionality of VA decisions, if denied, solely on account of race, color or gender}

7) "An alleged arbitrary quota system that obviates the Administrator's need to consider the evidence is no mere detail, but a serious question of constitutional dimension." (at 1478)

8) "Marozsan's allegation that the Administrator utilizes an arbitrary quota system requires constitutional analysis peculiarly within the competence of an independent judiciary." (at 1474)

9) "Without judicial review, statutory limits would be naught but empty words." (at 1477)

Re: Unsettled Law: Conflict Between 7th & 2nd Circuits

Cooper v. United States, No. 88 CIV 6106, slip op., 1989 WL 71213 (S.D. N.Y. June 23, 1989) (available on Lexis at 1989 U.S. Dist. LEXIS 6924); U.S. Supreme Court, cert denied 90-180.

The Southern District court declined to accept Cooper's allegations on the grounds that it was a claim for benefits disguised as a constitutional complaint. Judge Robert Patterson Jr. totally disregarded the contents of said complaint and ignored Cooper's several assertions in the body thereof and elsewhere that he did not seek judicial review of the decision, flawed as it was, but questioned the constitutionality of the VA's procedures which made it impossible to obtain a fair and impartial hearing.

Moreover, Judge Patterson held specifically that the 7th Circuit Court decision in Marozsan was not the law of the 2nd Circuit, preferring instead his erroneous interpretation of Anderson v. Veterans Administration, 559 F.2d, 935 (5th Cir. 1977), which according to Judge Patterson, held that hearing procedures were exempt from judicial review, relying entirely upon cases which were decided

before Johnson (1974) - namely, Ross v. U.S. 462 F.2d, 618 (9th Cir. 1972); and Milliken v. Gleason, 332 F.2d, 122 (1 Cir. 1964) decided before even Goldberg v. Kelly (1970).

Additionally, Judge Patterson mistakenly ruled that the Supreme Court decision in NARS supported his holding that Cooper's case was unreviewable when in fact this Court ruled just the opposite as evidenced from note 3 of Chief Justice Rehnquist's decision. (Supra Pages 36)

The 2nd Circuit affirmed Judge Patterson's decision (without in banc review) and without comment, despite the fact that the 2nd Circuit itself was split on the "Marozsan type" issue; the Southern District going one way, while the Connecticut District Court in Wallace going another. (Supra, Pages 35, 36)

Cooper complained of 13 reversible errors which Judge Patterson made, none of which were addressed by the 2nd Circuit.

Further, this Court denied certiorari. From that brief history, unless this Court grants petitioner's request, disabled veterans of the 2nd Circuit shall have no forum in which to seek judicial redress of the constitutional wrongs inflicted upon them while those of the 7th circuit have judicial license to do so.

Accordingly, this Court must resolve the conflict which currently exists between the 7th and 2nd Circuits pursuant to whether veterans have a right to litigate the constitutionality re the operation of the VA's claim system. In Chicago, you can, but in New York City, you cannot!!?

Unsettled Law: Bernklau v. U.S.

The Court of Appeals for the Federal Circuit (CAFC) declined to accept Bernklau's constitutional complaint on the grounds that P.L.100-687 denied CAFC jurisdiction to hear any issue which was

not previously raised before the Court of Veterans Appeals (CVA). Under the circumstances, in order for Bernklau to be heard in CVA, it would first be necessary to raise that issue before the BVA, which likewise, could not hear it unless it was raised at VA Regional.

Those circumstances place veterans in the peculiar situation of having to bring a constitutional matter to the VA, which asserts that it's not competent to consider such issues. As reported in Johnson, the BVA itself acknowledged in SLY that constitutional issues are "not within the jurisdiction of this Board." Johnson further reasoned that:

> "Sly thus accepts and follows the principle that adjudication of the constitutionality of congressional enactments have generally been thought beyond the jurisdiction of administrative agencies."
>
> Johnson at 368

If the Supreme Court reasons that constitutional issues are beyond the jurisdiction of agencies and perhaps

Article I courts, then how should Bernklau bring his constitutional complaint, and where must he begin? CAFC ducked the issue, will the Supreme Court address it?

Summary

Enacting legislation is one thing, but the administration thereof by bureaucrats is quite another. United States Senator Huey Long clearly understood this when he so wisely counseled against the enactment of § 211(a) saying:

> "How long are we going to sit here and see people turned out of hospitals and starved to death by these little 2 by 4 bureaucrats, exercising more power than the 96 members of the United States Senate? Instead of being men, standing up on 2 legs and 2 feet and running this government for the people of the United States, we are authorizing some bureaucrat to prescribe limits and rules under which he will work, and then permit him to go off and do what he pleases. That is the trouble with the whole "plague-take-it" system, and that is the reason why veterans are in the fix they find themselves today."
> (Cong. Record, June 2, 1933, at 4811)

Judge Learned Hand, in his famous "Spirit of Liberty" address warned

Americans against the false assumption that freedom is secure because the "Framers" enshrined it in the Bill of Rights. He said:

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."

Conclusion

Based upon all of the foregoing, VDP believes Bernklau is entitled to judicial review of his constitutional allegations in the Eastern District Court of New York and/or this Court's review of the constitutionality of § 211(a) [now 511(a)], considering that Johnson's holding pursuant to the constitutionality thereof was predicated upon blatant VA falsehoods.

DATED this 11th day of March, 1993.

Respectfully submitted,

Philip E. Cushman
President,
Veterans Due Process, Inc.
P.O. Box 68237
Portland, Oregon 97268
(503) 659-9912